

REMARKS

This amendment is in response to the Office Action mailed on August 20, 2007 in which claims 1, 3, 5-9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 30, 32, 34, 36, 38, 39, 41, 61, 63-65, 68, and 69 were rejected. Applicant respectfully requests reconsideration of the present application in view of the foregoing amendments and in view of the reasons that follow.

1. Examiner Interview Conducted on October 16, 2007

On October 16, 2007, Applicant's attorney conducted a telephonic interview with Examiner Miller during which the current amendment to independent claim 1 was discussed in view of Rabbe et al., U.S. Patent No. 6,344,057, and Strnad et al., U.S. Patent No. 6,296,665. The amendments to independent claims 1, 7, 11, 21, 32, 39, and 61 are intended to reflect the outcome of the discussion with the Examiner to provide additional structure relating to the "artificial spinal disc" of claims 1, 7, 21 and 61, the "artificial disc" of claims 32 and 39, and the "disc prosthesis" of claim 11 in order to distinguish over the disclosures of Rabbe et al. and Strnad et al. It is Applicant's understanding that the Examiner agrees that claim 1, as amended, overcomes the rejection based upon Rabbe et al. and Strnad et al. Applicant understands that additional searching may be required by the Examiner, and therefore has filed the present amendment along with an RCE.

During the interview, the Examiner identified Berry et al., U.S. Patent Application Publication No. 2005/0060034, as a potentially relevant reference. Berry et al. was cited in the Non-Final Office Action mailed September 9, 2005. As part of Applicant's response mailed November 9, 2005, Applicant submitted a Declaration of Prior Invention under 37 C.F.R. § 1.131 that establishes a date of invention prior to September 15, 2003, the filing date of Berry et al. Further, the Declaration of Prior Invention provides facts in evidence of various steps taken between September 15, 2003 and the filing date of the present application to establish diligence between September 15, 2003 and constructive reduction to practice. Applicant respectfully asserts that Berry et al. is not prior art.

In addition, during the interview, the Examiner identified Berry, U.S. Patent No. 5,895,428, as a potentially relevant reference. Independent claims 1, 7, 32, and 61 recite a “spinal implant system” including “a pedicle screw retainer.” Independent claims 11, 21, and 39 recite a “vertebral prosthesis system” including “a pedicle screw retainer.” Berry does not identically disclose a spinal implant system or a vertebral prosthesis system including “a pedicle screw retainer” as recited in independent claims 1, 7, 11, 21, 32, 39, and 61. Berry appears to disclose a “spacer fitting 105” disposed within an intervertebral space in conjunction with “a pair of optional elongate screws 108 which can extend through an extended portion of the vertebra ...and into the fitting 105,” “an upper implant fitting 101” and “a lower implant fitting 103. See Fig. 8, col. 6, lines 58-64 & col. 7, lines 1-4. Neither “spacer fitting 105,” “upper implant fitting 101,” nor “lower implant fitting 103” is a “pedicle screw retainer” as recited in independent claims 1, 7, 11, 21, 32, 39, and 61.

2. Rejection of Claims 1, 3, 5-9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 30, 32, 34, 36, 38, 39, 41, 61, 63-65, 68, and 69 Under 35 U.S.C. § 102(b) as Anticipated by Rabbe et al. and Strnad et al.

On page 4 of the Office Action, the Examiner rejected claims 1, 3, 5-9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 30, 32, 34, 36, 38, 39, 41, 61, 63-65, 68, and 69 under 35 U.S.C. § 102(b) as anticipated by Rabbe et al., U.S. Patent No. 6,344,057, and Strnad et al., U.S. Patent No. 6,296,665. Applicant has amended independent claims 1, 7, 11, 21, 32, 39, and 61 to overcome the rejections based on Rabbe et al. and Strnad et al.

In response to the earlier arguments made by Applicant, the Examiner identifies the “caps 23” of Rabbe et al. and the bone graft material of Strnad et al. as an “artificial spinal disc” as that term is used in independent claims 1, 7, 21, and 61, as an “artificial disc” as that term is used in independent claims 32 and 39, and as a “disc prosthesis” as that term is used in independent claim 11. Office Action, pages 2 and 3. The Examiner argues that, because both the “caps 23” of Rabbe et al. and the bone graft material of Strnad et al. would be positioned in the area naturally occupied by a natural spinal disc, each of these elements is an “artificial spinal disc” as

that term is used in independent claims 1, 7, 21, and 61, an “artificial disc” as that term is used in independent claims 32 and 39, and a “disc prosthesis” as that term is used in independent claim 11. Office Action, page 4.

In response, Applicant has amended independent claims 1, 7, 11, 21, 32, 39, and 61 to specify structural elements of the “artificial spinal disc” of independent claims 1, 7, 21, and 61, the “artificial disc” of independent claims 32 and 39, and the “disc prosthesis” of independent claim 11. Neither Rabbe et al. nor Strnad et al. identically disclose a structure that permits a range of motion between a vertebral prosthesis and a spine. In contrast, the “caps 23” of Rabbe et al. and the bone graft material of Strnad et al. only appear to occupy the space naturally occupied by a natural spinal disc and do not appear to permit a range of motion between a vertebral prosthesis and a spine.

In view of the amendments to independent claims 1, 7, 11, 21, 32, 39, and 61, and the arguments set forth above, Applicant respectfully asserts that independent claims 1, 7, 11, 21, 32, 39, and 61 and the corresponding dependent claims are not anticipated by Rabbe et al. or Strnad et al. under 35 U.S.C. § 102(b).

3. Amendments to Claims 3, 6, 9, 10, 12, 13, 15, 22, 23, 25, 29, 30, and 68-70

Applicant has amended dependent claims 3, 6, 9, 10, 12, 13, 15, 22, 23, 25, 29, 30, and 68-70 to maintain consistency with the amended corresponding independent claims. Applicant respectfully asserts that dependent claims 3, 6, 9, 10, 12, 13, 15, 22, 23, 25, 29, 30, and 68-70, as amended, are patentable.

4. Conclusion

Claims 1, 3, 5-13, 15, 17, 18, 21-23, 25, 27-30, 32, 34, 36-39, 41, 43, 61, 63-66, and 68-70 are pending in the present application. Claims 10, 12, 18, 22, 28, 37, 43, 66, and 70 are presently withdrawn. The Applicant believes that the present application is now in condition for allowance. Favorable reconsideration of the application, as amended, is respectfully requested.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by a check or credit card payment form being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

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